92-1347

No. _____

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In the Supreme Court of the United States

October Term, 1992

ERWIN RAUTENBERG, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent.

and

UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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1. Can the District Court continue to deny Petitioners the right to possess a copy of the protective order here, depriving them of the opportunity for free and unsupervised review of the document they must obey on pain of contempt, despite the fact that this Court has now put its substance on the public record?

2. Can the District Court continue to maintain the protective order under seal in the face of this Court's order unsealing the pleadings which disclose its substance?

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No. _____

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ERWIN RAUTENBERG, et al.,

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v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

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UNITED STATES OF AMERICA, et al.

Real Parties in Interest

PETITION FOR WRIT OF CERTIORARI

Petitioners, AIR-SEA FORWARDERS, its president, ERWIN RAUTENBERG, and its attorney,

MATTHEW STEINBERG, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, filed on August 26, 1992, denying Petitioners' petition for writ of mandamus. Petitioners' petition for rehearing from that order was denied on October 19, 1992.

ORDERS BELOW

The April 20, 1992 order of this Court denying Petitioners' petition for a writ of certiorari, but lifting the seal from various pleadings is attached hereto as Appendix A. The July 23, 1992 order of the District Court granting in part and denying in part Petitioners' motion to modify the protective order is attached hereto as Appendix B. The Ninth Circuit's August 26, 1992 order denying Petitioners' petition for writ of mandate is attached hereto as Appendix C. The Ninth Circuit's October 19, 1992 order denying Petitioners' petition for rehearing is attached as Appendix D.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing on October 19,

1992. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law . . . abridging the freedom of speech . . . ."

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

STATEMENT OF THE CASE

A. The Issuance of the Protective Order

Petitioner Air-Sea Forwarders Inc. ("Air-Sea") was an international freight forwarder and customs house broker for Air Asia Co., Ltd. and its predecessors ("Air Asia") from 1950 until July 27, 1981. Until 1975, Air Asia was "owned secretly by the Central Intelligence Agency" and operated primarily as an "aircraft repair and maintenance facility" for Air America, "the CIA's secret Southeast Asian air force . . . ." In 1975, Air Asia was acquired by E-Systems, Inc. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 179-180 (9th Cir. 1989).

On August 12, 1981, Air-Sea filed an action against Air Asia asserting that the termination was in violation of Air Asia's contract obligations. 880 F.2d 176, 180.

E-Systems responded to Air-Sea's pretrial discovery requests by moving for a protective order to restrict Air-Sea's access to confidential business information. In an *in camera ex parte* hearing, the United States then presented classified declarations in support of the issuance of a protective order (Government Response to Petition for Mandamus, hereinafter "Response," p. 3).

The District Court issued the protective order on November 6, 1984. This order "directed that no discovery be had and no evidence adduced at trial concerning certain contacts with foreign governments" or as to "whether a confidential relationship existed between the United States and certain specified private parties" (Response, p. 5).

Further, the court refused to give Petitioners a copy of the order. Petitioners Rautenberg and Steinberg were allowed to "examine" the protective order for a few minutes at a time, but only under the scrutiny of government agents. In addition, the court ordered them not to disclose to others the terms of the order, or the

participation of the government in the case, or even the very existence of the order (Response, p. 5).

Air-Sea attempted unsuccessfully to have the order vacated on March 18, 1986 (Response, p. 7). The court amended the order on November 21, 1991, and it is currently operative in its amended form (Response, p. 10).

At the conclusion of the trial, the jury awarded Air-Sea $216,151.50 in compensatory damages for breach of contract, $6,000,000 in punitive damages for the bad faith denial of the existence of the contract, as well as attorneys' fees. The district court then granted Air Asia's motion for judgment notwithstanding the verdict as to the bad faith claim and attorneys' fees, and a new trial as to the breach of contract claim. 880 F.2d 176, 181. On appeal, the Ninth Circuit reversed the judgment j.n.o.v., and affirmed the alternative grant of a new trial as to all issues. 880 F.2d 176, 181-90.

In the course of its opinion, the Ninth Circuit noted that "the district court was in communication with government lawyers concerning the role of classified information," and that "the district court entered a supplemental protective order regulating the admission of certain classified evidence . . . ." 880 F.2d at 192.

B. Petitioners' First Challenge to the Order in the Ninth Circuit

In preparation for the new trial on remand, Air-Sea again moved to vacate the order, and the motion was again denied, on November 6, 1989 (the transcript of the hearing was attached to Air-Sea's Emergency Petition for Writ of Mandamus, hereinafter "Petition I", as Exhibit "A").

After unsuccessful efforts to negotiate mutually acceptable modifications of the order (Petition I, Declaration of Matthew Steinberg, ¶ 15), Petitioners filed their emergency petition for mandamus asking the Ninth Circuit to vacate the order on April 6, 1990.

On June 11, 1990, the Ninth Circuit issued an order granting the writ petition unless the government filed a certification in support of its state secrets claim with the district court, in which case the district court was to rule on the claim (Appen. "A" to Petitioners' prior Petition for Certiorari, hereinafter "Cert. Pet. I").

On June 29, 1990, the government submitted the Declaration of William Webster, then director of the Central Intelligence Agency, asserting the state's secret privilege (Government Response to Supplemental

Petition for Writ of Mandamus, hereinafter "Supplemental Response", p. 11).

The declaration recited that Air Asia had been a proprietary of the CIA, but that the CIA had sold all outstanding shares to E-Systems in 1975 and that "[s]ince that time, CIA has had no relationship with Air Asia." Webster then invoked the privilege as to "any information pertaining to the nature, scope or extent of any relationship between CIA and E-Systems . . ." (attached to Supplemental Response).

On August 21, 1990, the district court issued its order upholding the government's claim of the state secrets privilege, and finding the protective order no more restrictive than necessary to protect that privilege (Cert. Pet. I, Appen. "B").

On October 11, 1990, Petitioners filed their Supplemental Petition for Writ of Mandamus, again asking the Ninth Circuit to vacate, or at least to modify, the protective order.

On February 13, 1991, the Ninth Circuit denied the petition (Cert. Pet. I, Appen. "C"). By order filed on April 1, 1991, the Ninth Circuit granted Petitioners' motion for reconsideration, but again denied the petition (Cert. Pet. I, Appen. "D"). On April 29, 1991, the Ninth

Circuit denied the petition for rehearing and suggestion for rehearing en banc (Cert. Pet. I, Appen. "E").

C. This Court's Action Placing the Substance of the Order on the Public Record.

Petitioners then petitioned this Court for certiorari. The certiorari petition sought relief from those aspects of the order which limit Petitioners' access to its text and prohibit any party from publicly disclosing its terms, or the government's participation in obtaining it (Cert. Pet. I).

Petitioners moved to file the Petition under seal, in conformity with the practice that had been followed with previous pleadings relating to the protective order (Exh. "A-2" to the Petition for Writ of Mandamus filed in the Ninth Circuit Court of Appeals on August 14, 1992, hereinafter Petition II).

In its response to the motion, the government conceded that

> "[b]ecause the government's interest in the litigation . . . is a matter of public record, reference to that interest in the

certiorari petition may not be barred
by the district court's protective order."
Petition II, Exh. "A-3", p. 11.

The government stated that it would not oppose the public filing of a redacted version of the petition disclosing the United States' involvement in the case and much of the content of the protective order itself (Petition II, Exh. "A-3" pp. 12-13).[1]

Petitioners then moved to file the petition publicly in the redacted form suggested by the government, and the motion was granted (Petition II, Exhs. "A-4", "A-5").

The government filed opposition to the Petition (Exh. "A-6"), insisting that there continued to be a "compelling interest" in maintaining the confidentiality of the aspect of the order not revealed in the public filing of the redacted petition: the fact that E-Systems is the "specified private entity" with which the United States has a "classified" relationship (Petition II, Exh. "A-6", pp. 15-17).

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[1] In the Response, the government itself described the terms of the protective order as directing that "no discovery be had and that no evidence be adduced at trial concerning certain contacts with foreign governments and certain information pertaining to whether a confidential relationship existed between the United States and specified private entity." The government also disclosed the provisions in the order restricting access to and disclosure of it (Exh. "A-3", pp. 5-6).

Petitioners filed a reply in two forms. One version, filed under seal (Petition II, Exh. "A-7") specifically challenged the government contention that E-Systems's classified relationships with our own and other governments was not a matter of public record; the other, filed publicly, did not.

Petitioners argued in the sealed reply and an addendum to it (Petition II, Exh. "A-9", also filed under seal) that published decisions of various federal courts (Petition II, Exh. "A-7", pp. 12-13), and testimony and documents introduced in the case of *Air-Sea Forwarders v. Air Asia Co.*, LASC C 668658 (of which this Court took judicial notice -- Petition II, Exhs. "A-10", "A-11"), placed the existence of contacts between the "specified private entity" and foreign governments, and classified relationships between that entity and the United States government, on the public record (Petition II, Exh. "A-7", pp. 13-14).

On April 20, 1992, this Court denied the petition, but made additional orders which, in sum, lifted the seal from *all* of the pleadings before it with the exception of the original unredacted petition (Appen. "A").

D. The District Court's Denial of Petitioners' Subsequent Request to Remove the Remaining Restrictions on Access to the Order.

(Note: all pleadings, orders and transcripts filed in the following proceedings were filed publicly, not under seal.)

On May 20, 1992, Petitioners filed their Motion to Modify the Protective Order in the District Court, asking that the Court (1) remove all restrictions on access to and disclosure of the order itself, (2) remove all restrictions on disclosure of the interest of the United States government in obtaining it, (3) lift the seal from the order, and (4) order the government to provide Plaintiff with certified copies of the original protective order and the November 21, 1985 amendment to it (Petition II, Exh. "A").

On July 23, 1992, Judge Gadbois issued his order denying Petitioners' motion, but amending the protective order to provide that its "disclosure restrictions" would not preclude restatement of anything contained in publicly filed pleadings or any other public record (Appen. "B").

On August 14, 1992, Petitioners filed their petition for writ of mandamus in the Ninth Circuit Court of Appeal, asking that court to lift the seal from the

protective order and order the Government to provide Petitioners with certified copies of it. The Ninth Circuit denied the petition on August 26, 1992 (Appen. "C"), and Petitioners' petition for rehearing on October 19, 1992 (Appen. "D").

REASONS FOR GRANTING REVIEW

INTRODUCTION

This Petition asks the Court to complete the work it began last year, and do away with an unprecedented and now utterly pointless anomaly which violates Petitioners'[2] Constitutional rights to free speech, access to the courts and due process of law, as well as the public's right to know:

A once-secret judicial order which, though this Court has placed the *totality* of its substance *on the public record*, is still kept under lock and key, hidden, not only from public view, but from Petitioners, who are forbidden to have a copy of it (or even to take notes of it on those limited occasions when they are allowed to see it for a few minutes) though they must obey it under threat of contempt.

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[2]As in the earlier petitions, the Petitioners here are Air-Sea Forwarders Inc., plaintiff in the underlying action; Erwin Rautenberg, President of Air-Sea Forwarders Inc.; and, Matthew Steinberg, trial attorney for Air-Sea Forwarders Inc. in the underlying action.

This Court, by its unsealing order of April 20, 1992 (Appen. "A") cut through the cloak of secrecy enshrouding the protective order, rendering what was left of it obsolete. That action placed upon the public record the substance of the protective order in its totality, revealing that it forbids disclosure of confidential relationships between E-Systems on the one hand, and the United States and foreign governments on the other.

Still, the District Court has preserved some remaining shreds of the secrecy that once surrounded the protective order, refusing to allow Petitioners to have a copy of the order or to lift the seal from it.

Petitioners ask this Court to complete what it began with its unsealing order (Appen. "A") and sweep aside these now meaningless but nonetheless harmful remains of the regime of secrecy by granting Petitioners a copy of the order and lifting the seal from it.

I. THE ORDER CONTINUES TO DEPRIVE PETITIONERS OF LIBERTY WITHOUT DUE PROCESS OF LAW BY DENYING THEM A COPY OF THE PROHIBITIONS THEY MUST OBEY UNDER THREAT OF CONTEMPT.

Despite this Court's action placing the substance of the protective order on the public record, the District

Court still refuses to let them have a copy of the order.

Thus Petitioners are still compelled under penalty of contempt to obey an order which they have never been allowed to have in their possession. They can still see the order only for a few minutes at a time, in the presence of government attorneys, and on terms set by them. They are still forbidden to take notes of the order or record their impressions of it by any other means while they examine it (see Declarations of Erwin Rautenberg and Matthew Steinberg, Exhibits "I" and "J" to Petition II).

Having been required to read and sign the order under an explicit threat of prosecution and an implicit threat of physical coercion, and still suffering from the tinnitus brought on by the strain, Petitioner Rautenberg thus continues to live under the compulsion of rules which he must commit to memory *under conditions set by the government, and over which he has no control.* He remains in the Kafkaesque condition of a man who is haunted by the fear that he may at any moment incur guilt for violating a rule he cannot remember (Petition II, Exh. "I", ¶ 8), a condition which is incompatible with the very idea of the rule of law. See *International Longshoreman Association v. Philadelphia Mar. T.A*, 389

U.S. 64, 76, 88 S.Ct. 201, 208 (1967); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Due process of law requires that those who must obey rules at their peril have the fullest opportunity to understand them. *United States v. Lane*, 759 F.2d 618 (1985) at 622; *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F.2d 800 (2d Cir. 1981). They should have the opportunity "to conduct a free, careful, deliberative and unsupervised" review of prohibitions which apply to them (Supplemental Petition: Declaration of Matthew Steinberg, ¶ 8). Only possession of a copy of the rules can give them that opportunity, and that is precisely what the District Court continues to deny to Petitioners here.

It is true that this Court has now put the *substance* of the protective order on the public record by lifting the seal from earlier pleadings in this matter. But a person who, like Petitioners, may be punished with contempt for even *inadvertent* violations of an order (Supplemental Petition, Exh. "D", p. 7) has a right to know, not merely its substance, but its details, and to know them with certainty:

> "As a matter of due process, no one may be required at the peril of loss of liberty to

> speculate as to the meaning of penal statutes."

United States v. Gilbert, 813 F.2d 1523 at 1530.

Further, by placing the substance of the protective order on the public record, this Court has made untenable any further pretense that national security compels the restriction of access to it. With no legitimate governmental interest left to support them, the remaining restrictions on access are now in flagrant violation of Petitioners' due process and First Amendment rights. *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 at 495.

Now that this Court has placed the order's substance on the public record, there can thus be no possible justification for continuing to deny a copy of it to the one person who must at his peril know precisely what it says: Petitioner Erwin Rautenberg. This Court should ensure that he will be given a copy of the protective order.

II. THE DISTRICT COURT'S REFUSAL TO GIVE PETITIONERS COPIES OF THE ORDER WHILE THEY PREPARE FOR RETRIAL ABRIDGES THEIR RIGHT OF ACCESS TO THE COURTS.

The Constitution grants to Petitioners a right of access to the courts, including the right to the "means required for a litigant to get a fair hearing from the judiciary . . . ." *O'Conner v. Mowbray*, 504 F.Supp. 139 at 141 (D. Nev. 1980).

The retrial of the underlying case is currently pending in the District Court, and if Mr. Rautenberg's attorney is to prepare him for retrial effectively, the attorney must be able to determine before trial what the protective order will allow his client to say on the stand and what it will not. He therefore needs detailed and accurate knowledge of what the protective order requires. He cannot rely on statements of its substance alone because, if he is wrong as to details, he risks not only a disruption of his trial strategy but punishment for contempt for himself and his client as well.

A copy of the protective order is, therefore, among the "means required" to prepare for trial adequately and gain a fair hearing from the District Court. The

continuing denial of a copy to Petitioners will compel Rautenberg to prepare his testimony under a cloud of uncertainty about what may bring down punishment for contempt upon him (even inadvertently, Supplemental Petition, Exh. "D", p. 7), constricting his capacity to present his case effectively to the court and jury, and thus depriving him of the full and free access to the courts for the redress of his grievances to which he has a right.

For this reason as well, this Court must ensure that Petitioners receive a copy of the order.

III. THIS COURT'S GRANT OF PUBLIC ACCESS TO THE SUBSTANCE OF THE PROTECTIVE ORDER MAKES IT CONSTITUTIONALLY UNTENABLE TO CONTINUE TO MAINTAIN IT UNDER SEAL.

The First Amendment forbids any limit on the dissemination of information which has been placed on the public record. This Court held, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 495, *supra*, that

> "the First and Fourteenth Amendments command nothing less than that the

> States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."

The *Cox* court reasoned that, having placed information on the public record, "the State must be presumed to have concluded that the public interest was thereby being served . . . ." 420 U.S. at 495.

This Court has since reaffirmed that doctrine a number of times (*Oklahoma Publishing Co. v. District Court* (1977) 480 U.S. 308, 310; *Smith v. Daily Mail Publishing Co.* (1979) 443 U.S. 97, 103), finding it to rest on "settled principles." *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539 at 568.

These decisions establish the right to free publication of information which is on the public record as the essential corollary to the public's right of access:

> "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the *true contents* of

> records by the media." (Emphasis added.)

Cox Broadcasting Corporation v. Cohn, *supra*, 420 U.S. at 495.

The existence of the protective order here, and the government's role in obtaining it, were placed on the public record by the Ninth Circuit's published opinion in *Air-Sea Forwarders v. Air Asia Co., Ltd.* 880 F.2d 176, 192, *supra*.

The substance of the order was then made public by this Court, in two stages:

First, this Court disclosed the procedural structure of the order as well as the general character of its substantive content, by allowing the public filing of the redacted petition for certiorari (Petition II, Exh. "A-5").

The redacted petition described the order's limits on access to and disclosure of its own content, and stated (quoting from a government pleading which had previously been filed under seal) that it

> "'directed that no discovery be had and no evidence adduced at trial

> concerning certain contacts with foreign governments' or as to 'whether a confidential relationship existed between the United States and certain specified parties.'"
>
> Petition II, Exh. "A-1", p. 4.

Then, by lifting the seal from Plaintiff's unredacted reply and motion to take judicial notice in its final order (Petition II, Exh. "A-11"), this Court put the protective order's last remaining secret on the public record as well: these pleadings disclosed E-Systems as the "specified" entity[3] whose relationships with our own and foreign governments are to be kept secret, and made it clear that those relationships were *already* a matter of public record (Petition II, Exh. "A-8", pp. 11-15; Petition II, Exh. "A-10", p. 2).

This Court, having placed the content of the protective order on the public record, must "be presumed to have concluded that the public interest was thereby being served . . . ." *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. 469 at 495. By its unsealing of the

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[3] The government corrected itself, and moved from the plural of the Ninth Circuit pleading to the singular in describing the entity to be protected in its pleadings before the Supreme Court (Exh. "A-3", p. 5).

pleadings, this Court thus definitively established that the public interest will best be served by disclosure of the protective order to the public, and any effort to restrict access to the order is therefore barred by the First Amendment. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 469 at 495.

Yet the protective order remains under seal, restricting public disclosure and thereby blocking realization of the public interest which this Court recognized by its unsealing order. Because the seal on the order is incompatible with the right of Petitioners and of the public, it must be lifted.

Justice Holmes insisted that the public must have access to civil judicial proceedings

> "not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself

> with his own eyes as to the mode in which a public duty is performed."

Cowley v. Pulsifer 137 Mass. 392 at 394 (1884), quoted in *Publicker Industries, Inc. v. Cohen* (1984) 733 F.2d 1059 at 1069.

Petitioners now ask this Court to remove the remaining barriers to the full achievement of the public interest to which it gave recognition and partial realization in its unsealing order. Any interested member of the public is already free to hear about and read about the order. The seal must be lifted so that such a person will also be able to "satisfy himself with his own eyes" as to its nature of the order.

IV. CONCLUSION

The protective order has been an unparalleled anomaly in our legal system from the outset: a secret decree which denies those subject to it free access to its terms and the right to disclose its very existence to others. The order is necessarily at war with the most basic tenets of the Rule of Law, and violates Petitioners' fundamental constitutional rights.

This Court has already substantially dismantled this gratuitous structure of secrecy by putting the substance of

the order on the public record. But this action has only made the surviving fragments of secrecy that cling to the order even more anomalous. Though the substance of the order's content has now been fully disclosed to the public, the order itself remains hidden from public view, and Petitioners still cannot have a copy of it.

Petitioners ask this Court to complete the work that it began last year, by removing these remaining vestiges of pointless secrecy that once surrounded the order. This action will at least put an end to Erwin Rautenberg's seven-and-one-half year ordeal of uncertainty and fear, and finally give him a full and fair opportunity to present his case in court.

For the reasons stated above, therefore, Petitioners respectfully request that this Court grant its writ of certiorari, either to hear this case or summarily order modification of the protective order to lift the seal from it and permit Petitioners to have a copy of it.

Respectfully submitted,

ROBERT S. GERSTEIN
Attorney for Petitioners

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 20, 1992

Mr. Robert S. Gerstein
1717 Fourth St., 3rd Floor
Santa Monica, CA 90401

Re: Erwin Rautenberg, et al.
v. United States District Court for the Central District of California
(United States, et al., Real Parties in Interest)
No. 91-1136

Dear Mr. Gerstein:

The Court today entered the following order in the above-entitled case:

The motion of petitioners for leave to file an unredacted petition for a writ of certiorari under seal is granted. The motion of the Solicitor General for leave to file a brief in opposition initially under seal and to lift seal on brief in opposition and on the prior filing is granted. The motion of petitioners for leave to file a reply brief and addendum to reply brief under seal is granted and the seal is lifted. The motion of

petitioners to file motion to take judicial notice under seal is granted. The seal is lifted and the motion to take judicial notice is granted. The petition for a writ of certiorari is denied.

Very truly yours,

/s/ WILLIAM K. SUTER
William K. Suter, Clerk

APPENDIX B

FILED
AUG 26 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIR-SEA FORWARDERS, INC.,	)	No. 92-70565
Petitioner,	)	D.C. No. CV-81-4103-RAG
vs.	)	Central California (Los Angeles
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER
Respondent,	)	
and	)	
AIR ASIA COMPANY, et al.,	)	
Real Parties in Interest.	)	

Before: BRUNETTI, RYMER and KLEINFELD, Circuit Judges

The petition for writ of mandamus is denied.

MoCal 8/24/92/sg
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APPENDIX B

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIR-SEA FORWARDERS, INC.,	) CASE NO. CV 81-4103 RG
Plaintiff,	) ORDER DENYING PLAINTIFF'S MOTION TO MODIFY PROTECTIVE ORDER
v.	)
AIR ASIA COMPANY LIMITED, and E-SYSTEMS, INC.,	)
Defendants.	)

Upon consideration of the plaintiff's Motion to Modify Protective Order, the United States' Response thereto and the entire record herein, it is this 22nd day of July, 1992, hereby:

ORDERED that the plaintiff's Motion to Modify Protective Order is denied, and further

ORDERED that the disclosure restrictions of the Protective Order do not preclude restatement or other

publication of statements or materials (i) in briefs which have been filed before this Court and appellate courts in this case and which are not under seal and (ii) any other public records.

/s/ RICHARD A. GADBOIS, JR.
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: July 23, 1992

APPENDIX D

FILED
OCT 19 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIR-SEA FORWARDERS, INC.,	)	No. 92-70565
Petitioner,	)	D.C. No. CV-81-4103-RAG Central California (Los Angeles)
vs.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	ORDER
Respondent,	)	
and	)	
AIR ASIA COMPANY, et al.,	)	
Real Parties in Interest.	)	

Before: BRUNETTI, RYMER and KLEINFELD, Circuit Judges

The petition for rehearing and suggestion for rehearing en banc are denied. The Clerk shall accept no further filings in this closed docket.

Memo 9/23/92 (MoCal 8/24/92)

APPENDIX D

No. 92-1347

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERWIN RAUTENBERG, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES OF AMERICA, ET AL., REAL PARTIES IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying petitioners' second petition for a writ of mandamus seeking to lift the seal on a protective order that was entered by the district court to limit dissemination of information obtained through civil discovery and protected by the state secrets privilege.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. B1) and the order of the district court (Pet. App. C1-C2) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) denying the petition for a writ of mandamus was entered on August 26, 1992. A petition for rehearing was denied on October 19, 1992. Pet. App. D1. The petition for a writ of certiorari was filed on January 19, 1993, a Tuesday following a federal holiday. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is petitioners' second petition for a writ of certiorari seeking review of a protective order that limits the scope of discovery and evidence that may be adduced at trial of a private civil action. The Court denied petitioners' prior petition a year ago. 112 S. Ct. 1704 (1992) (No. 91-1136). The pertinent facts and procedural history of the underlying lawsuit are set forth in greater detail in our brief in opposition (at 2-7) in No. 91-1136 and in *Air-Sea Forwarders, Inc.* v. *Air Asia Co.*, 880 F.2d 176, 179-180 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990).

Briefly, plaintiff/petitioner Air-Sea Forwarders, Inc., of which petitioner Rautenberg is president, alleges that in the 1950s, defendant Air Asia Co. arranged for Air-Sea's services as a freight-forwarder and customs broker. Air-Sea further alleges that Air Asia entered into an oral contract in 1956 under which that arrangement could be terminated only for good cause. At that time, Air Asia was secretly owned and controlled by the Central Intelligence Agency. In 1975, however, the CIA sold Air Asia to defendant E-Systems, Inc., a private corporation. In 1981, Air Asia selected another freight forwarder. Air-Sea then brought this suit against E-Systems and Air Asia, alleging wrongful termination of the contract. See 91-1136 Br. in Opp. 2.

Air-Sea sought extensive discovery of the two private defendants and certain matters of interest to the United States. On November 6, 1984, the district court, at the request of defendant E-Systems and the

United States (which is not a party to the underlying lawsuit), entered a protective order limiting the scope of discovery and evidence that could be adduced at trial. The court found that the information E-Systems sought to protect constituted confidential research, development, and commercial information, and that the information was in any event irrelevant to Air-Sea's claims. In addition, the court found that the information of interest to the United States constituted sensitive national security information that would be subject to a formal claim of state secrets privilege and that was protected from disclosure by several statutory provisions. See 91-1136 Br. in Opp. 2.

After a trial on the merits, the jury returned verdicts in favor of Air-Sea in the amounts of $216,151.50 in compensatory damages for breach of contract and $6 million in punitive damages for bad faith denial of the existence of a contract. The district court, however, granted the defendants' motion for judgment n.o.v. on the bad faith claim and for a new trial on the breach of contract claim. 880 F.2d at 181. Air-Sea appealed the judgment n.o.v. to the Ninth Circuit, pursuant to Fed. R. Civ. P. 54(b), but it did not challenge the validity of the protective order. See 880 F.2d at 179 n.1, 192. The Ninth Circuit reversed the judgment n.o.v. and remanded for a new trial. *Id.* at 181-191. The case is still awaiting retrial in the district court.

2. After the case was remanded, petitioners filed a petition for a writ of mandamus in the court of appeals, seeking an order directing the district court

to lift the seal on the protective order. The court of appeals denied relief. 91-1136 Pet. App. C1.

Petitioners then filed a petition for a writ of certiorari seeking review of the court of appeals' denial of mandamus. To preserve the confidentiality of the privileged information in the protective order, the certiorari petition was filed under seal. Thereafter, at the suggestion of the United States, a redacted copy of the certiorari petition was filed on the public record. See 112 S. Ct. 576 (1991). The brief for the United States in opposition and petitioners' reply brief were also initially filed under seal. This Court denied the petition on April 20, 1992. 112 S. Ct. 1704 (*reproduced at* Pet. App. A1-A2). At the same time, the Court lifted the seal on our brief in opposition and petitioners' reply brief, but maintained the seal on the unredacted certiorari petition. *Ibid.*

3. a. On May 20, 1992, petitioners filed a motion in the district court to modify the protective order. Specifically, petitioners requested that the district court: (1) remove all restrictions on access to and disclosure of the protective order; (2) remove all restrictions on disclosure of the interest of the United States government in obtaining the protective order; (3) lift the seal from the order; and (4) order the government to provide them certified copies of the order, as amended. C.A. Emergency Petition for Writ Of Mandamus, Exh. A. On July 23, 1992, the district court denied petitioners' motion, noting that "the disclosure restrictions of the Protective Order do not preclude restatement or other publication of statements or materials (i) in briefs which have been filed before this Court and appellate courts in this case and

which are not under seal and (ii) any other public records." Pet. App. C1-C2.

b. On August 14, 1992, petitioners filed a second petition for a writ of mandamus in the court of appeals, again seeking an order directing the district court to lift the seal on the protective order and to provide petitioners with certified copies of the order. C.A. Emergency Petition for Writ of Mandamus at 3-4; see Pet. 11-12. The court of appeals denied the mandamus petition on August 26, 1992. Pet. App. B1. The court of appeals denied petitioners' petition for rehearing on October 19, 1992, directing in addition that "[t]he Clerk shall accept no further filings in this closed docket." Pet. App. D1.

ARGUMENT

The court of appeals did not abuse its discretion in denying petitioners' second and largely duplicative request for a writ of mandamus to compel unsealing of the protective order entered by the district court to maintain the confidentiality of privileged information. The court of appeals' unpublished, one-sentence order denying mandamus does not conflict with any decision of this Court or any other court of appeals or otherwise warrant review by this Court. In fact, most of the arguments raised by petitioners in the instant certiorari petition were raised by petitioners in their prior petition. That petition was denied, and circumstances have not changed since that time. There accordingly is no reason for a different disposition here.

1. Petitioners' contention (Pet. 13-16) that the protective order violates their due process rights merely rehashes arguments made in their certiorari

petition in No. 91-1136. As we explained more fully in our brief in opposition (at 11-14) on that occasion, petitioners' due process claims furnish no basis for mandamus relief. A writ of mandamus may issue only where there is no other adequate means of obtaining relief. *Mallard* v. *United States District Court*, 490 U.S. 296, 309 (1989). Petitioners, however, chose to forgo a right to challenge the protective order in their prior appeal from the final judgment on their claim of bad faith denial of the existence of a contract. See 91-1136 Br. in Opp. 4-5, 8-10. For that reason alone, the court of appeals was correct in once again denying mandamus.

In addition, a writ of mandamus may issue only where the petitioner demonstrates a "clear and indisputable" right to relief. *Mallard*, 490 U.S. at 309. Petitioners have not done so here. Petitioners' due process claim rests on the assertion that while they are faced with the possibility of contempt sanctions for violating the protective order, they are unable to ascertain what the order requires of them. As we previously explained (see 91-1136 Br. in Opp. 11-14), that assertion is belied by the record. Petitioner Rautenberg read the order with counsel present one day after it was issued. *Id.* at 12. When Rautenberg later maintained that a medical condition had caused him to forget the protective order's requirements, government counsel took additional steps to ensure that he remained adequately apprised of its terms. Specifically, government counsel deposed Rautenberg, requested him to reread the order, and inquired whether he understood its terms. Rautenberg, who was represented by petitioner

Steinberg at the deposition, stated that he understood each pertinent page of the order and that he understood that he could inspect the order again if, at any time in the future, he was unable to recall its terms. *Id.* at 12-13. The protective order is and has been available for inspection by counsel upon reasonable request in the Office of the United States Attorney for the district in which Air-Sea's civil action is pending, and a number of Air-Sea's attorneys, including petitioner Steinberg, have reviewed the order under those procedures. *Id.* at 13.

Moreover, the text of the protective order is unambiguous and affords precise notice of the obligations it imposes upon petitioners. It focuses on preserving the confidentiality of information concerning the existence, nature, and scope of a classified relationship with a particular private party. In fact, Rautenberg stated in his deposition that he understood each of the order's provisions, without any suggestion that it is vague or imprecise. See 91-1136 Br. in Opp. 13-14.

In any event, petitioners' due process objection to a possible contempt citation is entirely speculative, because they have not been cited for contempt. Nor have they shown that they would not have an adequate opportunity to raise any due process claim if contempt proceedings were to be instituted in the future. As we have pointed out above, the existence of an alternative means for raising any due process claim renders mandamus relief inappropriate. See *Mallard*, 490 U.S. at 309.

2. For similar reasons, petitioners' claim (Pet. 17-18) that the protective order abridges their right of

access to the courts furnishes no basis for mandamus relief. As we have explained above—and contrary to petitioners' intimation—counsel may inspect the protective order whenever necessary in preparing for trial. They have not shown that this manner of access is inadequate.

The protective order would not in any event violate petitioners' right of access to the courts. The limitations in the protective order were imposed to preserve the confidentiality of information protected by a validly established privilege for state secrets. See 91-1136 Br. in Opp. 6. This Court has made clear that the proper assertion of the state secrets privilege may warrant even dismissal of a case if the case cannot be resolved without disclosure of information protected by the privilege. See *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981); *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953). If dismissal of an entire lawsuit is permissible in such circumstances, then mere limitations on disclosure of a protective order limiting the scope of discovery and evidence that may be adduced at trial are also permissible.

Moreover, petitioners have not shown that an appeal from an adverse final judgment in the civil action would not afford them a fully adequate opportunity to raise any claim that their asserted lack of access to the protective order impermissibly affected their ability to present their case (if we assume, arguendo, that petitioners' failure to object to the protective order on their prior appeal did not constitute a waiver of the claim). Again, given the availability of a subsequent appeal, the court of

appeals was especially justified in denying mandamus relief.

3. Petitioners finally contend (Pet. 18-23) that mandamus relief to make the protective order public is now warranted in light of this Court's orders that allowed the public filing of their redacted certiorari petition in No. 91-1136 and lifted the seal from petitioners' unredacted reply brief and motion to take judicial notice in connection with that petition. 112 S. Ct. 576 (1991); 112 S. Ct. 1704 (1992). The difficulty with that contention is that this Court, in the very same order in which it took the last of the actions on which petitioners rely, *denied* petitioners' certiorari petition. That petition, like the instant one, asked this Court to require that the protective order be made public. Nothing has changed since that time. Because the Court denied certiorari (and thereby left the protective order in place) even though it had made certain filings public, the public nature of those filings furnishes no basis for a different disposition here.

Petitioners' First Amendment claim based on those public filings is without merit in any event. The United States has established that the nature and extent of a confidential relationship between the government and a specified private entity is protected from disclosure by the state secrets privilege. The protective order, by identifying that private entity, itself contains information protected by the privilege, and it was for that reason that the district court imposed limitations on public access to and dissemination of the order.

Petitioners contend that this Court, by lifting the seal on certain filings, has now placed the very same information on the public record, and that the protective order's prohibition on disclosure of the same information therefore violates the First Amendment. The factual predicate for this argument, however, is wrong. The Court did not lift the seal on the protective order. Nor did it lift the seal on the unredacted petition for a writ of certiorari. The materials from which the Court did lift the seal contain no official confirmation by the United States that it currently maintains a confidential relationship with the private entity identified in the protective order. Insofar as it may be reflected in the protective order, that information properly may, consistent with the First Amendment, be protected from public dissemination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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